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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 24(5) of the Rules of this Court the following memorandum is submitted in light of the decisions of this Court in the case of *United States* v. *Giordano*, No. 72-1057, decided May 13, 1974, and *United States* v. *Chavez*, No. 72-1319, decided May 13, 1974.

In our petition in No. 73-64 and again in our reply to the memorandum of the Solicitor General we pointed

out that while the issues of proper authorization and identification raised in *Giordano* and *Chavez* were present in our case, there was additionally present the critical problem of the burden of proof and the quantum of evidence required to show that an alleged authorization by the Attorney General had in fact been given. We ask that the Court grant certiorari on question 1 * in the petition limited to the following issues included thereunder:

(a) Where the Government had erroneously represented to the judge who issued the wiretap warrant that the Assistant Attorney General had authorized an application therefor, does the Government have the burden of proving that authorization was in fact given by the Attorney General? If so, what is the quantum of the Government's burden: by a mere preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt?

(b) Can such burden be satisfied in the absence of any sworn statement by the Attorney General that he personally authorized the wiretap application?

In the majority opinion in *Chavez,* this Court said at p. 16:

> "When it is *clearly established,* therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General,

* The Solicitor General's Memorandum in response to the petition has agreed that certiorari should in any event be granted on question No. 2, which presents an issue unrelated to electronic surveillance.

> the misidentification, by itself, will not render interceptions conducted under the order 'unlawful' . . ." (Emphasis added.)

This, we submit, at least implies that the applicable burden of proof is by clear and convincing evidence. Since the information that must be proved is solely within the Government's knowledge, no lesser quantum of proof would be appropriate.

In the instant case the authorization by the Attorney General has not only not been "clearly established"; we contend that it has not been established at all. For here, unlike *Chavez, no affidavit was submitted by the Attorney General.* In this case the Executive Assistant to the Attorney General, Mr. Lindenbaum, submitted an affidavit alleging that the Attorney General personally approved the application. When Mr. Lindenbaum was subsequently deposed in this case he testified that he did not discuss this case with Mr. Mitchell and did not see him place his initials on the memorandum of authorization. (407a-412a.)

The need for sworn testimony, by affidavit or otherwise, from the Attorney General himself, is not only an evidentiary one. It also serves the need, stressed by both majority and dissenting opinions in *Chavez,* to "fix responsibility" for the wiretap authorization. The majority and dissent in *Chavez* differed as to whether it was adequate for responsibility to be "established by an *ex post facto* affidavit of the Attorney General, stating that he in fact authorized the Chavez surveillance." (Dissenting opinion at p. 9.) But here there has never been, ex post facto or otherwise, an affidavit of the Attorney General stating that he authorized the surveillance. Rather such responsibility has been attributed to him by the allegations of a subordinate ap-

pointed official, and neither affirmed nor denied by the Attorney General himself.

This Court has within the past few days decided that the matter of proper authorization in wiretap cases is an issue of grave importance. However, this Court's decisions in *Giordano* and *Chavez* leave unanswered the questions of the proper evidentiary method of proving proper authorization and the attendant problem of the burden of proof therein.

It is clear now that the Executive Assistant to the Attorney General may not authorize electronic surveillances. What is not clear now is whether the testimony of the Executive Assistant to the Attorney General may be substituted for the testimony of the Attorney General, when the executive assistant by his own admission has no first hand knowledge of what actually occurred in a particular case such as the instant one.

The issues relating to proof of authorization, raised by this memorandum, have been raised by us in the District Court, in the Circuit Court, and in this Court in our original petition and again more extensively in our Reply to the Memorandum of the Solicitor General. We respectfully submit that these issues warrant a grant of certiorari on question 1, or alternatively an Order remanding the case to the District Court for an adequate evidentiary hearing to determine by competent evidence the actual facts as to the alleged authorization.

Respectfully submitted,

JAMES E. MCLAUGHLIN
Attorney for Petitioners

May, 1974